

**In The
Supreme Court of the United States
October Term, 1997**

UNITED STATES,

Petitioner,

-vs-

ALOYZAS BALSYS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

**BRIEF OF WORLD JEWISH CONGRESS
AND HOLOCAUST SURVIVORS AND FRIENDS
IN PURSUIT OF JUSTICE, INC.
AS AMICI CURIAE
IN SUPPORT OF THE PETITIONER**

ELIZABETH HOLTZMAN
Counsel of Record
Herrick, Feinstein, LLP
2 Park Avenue
New York, NY 10016
(212) 592-1400

SANFORD HAUSLER
Counsel of Record
1568 59th Street
Brooklyn, NY 11219-5028
(718) 633-0847

Counsel for *Amici* World Jewish
Congress and Holocaust Survivors and
Friends in Pursuit of Justice, Inc.

QUESTIONS PRESENTED

1. Has Balsys, who made voluntary statements under oath in a visa application in order to enter the United States and obtain the benefit of permanent resident status and later refused to answer questions relating to those very statements because he fears that his testimony might incriminate him in a foreign prosecution, (a) forfeited his right to remain silent or (b) if he has not, may he, if he chooses to remain silent, be required to relinquish the benefit that he secured by his prior statements?
2. Is Balsys, who has asserted that his testimony at a deposition could be used against him at a subsequent foreign prosecution, be adequately protected from self-incrimination if a sealing order that would prevent the foreign government from obtaining his testimony is issued?

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Amici World Jewish Congress and Holocaust Survivors and Friends in Pursuit of Justice, Inc., on consent of the parties, submit this brief *amici curiae* in support of the Government.¹

INTEREST OF AMICI

Amici are Jewish organizations whose purpose includes combating anti-Semitism. They are concerned with bringing

¹ No party other than *amici* and their counsel have paid any expenses relating to this brief. This brief was written solely by *amici's* counsel.

to justice those who persecuted Jews and others during the Nazi era. They believe that the Second Circuit's decision in *Balsys* would transform our Constitution's Fifth Amendment from its historic role as a shield for basic human rights into a sword for protecting perpetrators of mass murder who entered this country illegally. The Second Circuit's holding, if allowed to stand, would reward Nazi war criminals who lied when they voluntarily completed their visa applications for entry into the United States, belittle the strong interest that the Government has in ensuring that such war criminals do not find a haven in this country and do nothing to advance the purposes of the Fifth Amendment.

Amici believe that it is not necessary for this Court to reach the constitutional question of whether the Fifth Amendment protects against the fear of self-incrimination involving foreign prosecutions because this case can be decided on other, nonconstitutional grounds. *Amici* would like to advance certain additional arguments not found in the Government's brief respecting those grounds. First, *amici* contend that respondent Aloyzas Balsys, by voluntarily making sworn statements in his visa application relating to his wartime activities and receiving a continuing benefit from such statements — entry into the United States and permanent resident status here — (1) has forfeited his right to object to further questioning about those wartime activities or (2) if he nonetheless chooses to remain silent, has forfeited the benefits of his initial answers, *i.e.*, his permanent resident status. Second, *amici* suggest that both the Government's interest in obtaining Balsys's testimony and Balsys's interest in avoiding self-incrimination can be accommodated by the issuance of an appropriate sealing order.²

² *Amici* also take sharp issue with statements made by Judge Meskill in his concurring opinion below to the extent that they could be construed as supporting broader Fifth Amendment rights for Nazi war

Amici believe that their discussion of the foregoing issues will assist the Court in its resolution of this case.

STATEMENT OF FACTS

Respondent Aloyzas Balsys is a Lithuanian national, living in the United States since 1961. Although Balsys stated, under oath, in his visa application that he had served in the Lithuanian army from 1934 to 1940 and had been "in hiding" from 1940 to 1944, the Government suspects that he persecuted Jews and others as a member of the Lithuanian Security Police during World War II. If the Government's suspicions are correct, Balsys would be deportable under United States law.

To ascertain his actual activities during the relevant period, the Government issued an administrative subpoena, pursuant to 8 U.S.C. § 1225, requiring Balsys to appear at a deposition and answer questions. Balsys, however, refused to answer any questions other than providing his name and current address, asserting the Fifth Amendment right against self-incrimination. Balsys concedes that he does not fear criminal prosecution in the United States. He invoked the privilege solely based on his belief that he could be prosecuted in Lithuania, Israel or Germany and that his testimony in the United States could be used against him in any such prosecution.

The Government commenced an action in the United States District Court for the Eastern District of New York, seeking an order to compel Balsys to comply with the subpoena. The District Court found for the Government,

criminals than other individuals. *United States v. Balsys*, 119 F.3d 122, 143 (2d Cir. 1997) (concurring, Meskill, J.), cert. granted, 66 U.S.L.W. 3467 (U.S. Jan. 20, 1998). It would be anomalous, indeed, if those accused of participation in the Holocaust had more protections than the perpetrators of less heinous crimes.

holding that (1) the Fifth Amendment privilege did not extend to foreign prosecutions and (2) Balsys had waived the privilege by completing the visa application. *United States v. Balsys*, 918 F. Supp. 588 (E.D.N.Y. 1996). Balsys appealed.

The Second Circuit reversed, holding that the Fifth Amendment was applicable and that Balsys had not waived his rights. *United States v. Balsys*, 119 F.3d 122 (2d Cir. 1997). Rehearing and rehearing *en banc* were sought and denied.

The Government petitioned for certiorari, asking this Court to consider the question of whether the Fifth Amendment precluded self-incrimination where the prosecution feared by the witness was foreign, rather than domestic. This Court granted certiorari on January 20, 1998. *United States v. Balsys*, 66 U.S.L.W. 3467 (U.S. Jan. 20, 1998).

SUMMARY OF ARGUMENT

Balsys made voluntary statements under oath on his visa application about his activities during World War II. As a result of those statements, he obtained permanent resident status in this country. Now he refuses to answer questions relating to the same subject matter, claiming that his testimony could incriminate him in a foreign country.

The precedents of this Court and of several courts of appeals show that an individual may not use the Fifth Amendment as a sword. Having put a favorable view of the facts into the record in order to secure a benefit, that person may not refuse to answer questions about those facts and continue to enjoy the benefit. The individual must either answer the questions or relinquish the benefit.

Balsys's purported Fifth Amendment right against self-incrimination can adequately be protected by the issuance of an appropriate sealing order.

ARGUMENT

I. BALSYS CANNOT BOTH RETAIN THE CONTINUING BENEFIT HE SECURED THROUGH THE VOLUNTARY, SWORN STATEMENTS HE MADE IN HIS VISA APPLICATION AND TO REFUSE TO ANSWER QUESTIONS RELATING TO THE SUBJECT MATTER OF THOSE STATEMENTS

Balsys's position in this case has been that he should be allowed to retain the continuing benefit of permanent resident status—which he obtained by virtue of his voluntary, sworn statement about his wartime activities—while at the same time refusing to answer questions about those activities that have been posed to determine his eligibility for this benefit. The Fifth Amendment does not allow Balsys to remain silent and to reap these rewards.

In this case, the Court need not reach the constitutional question of whether the threat of foreign prosecution triggers rights under the Fifth Amendment³ because Balsys's statements in his visa application, made voluntarily and under oath, constitute a forfeiture or waiver of any such rights.⁴

³ As a general rule, this Court will not decide a constitutional question in a case when there exists a nonconstitutional basis on which the case can be decided. *Clinton v. Jones*, 117 S. Ct. 1636, 1642 & n.11 (1997); *United States v. National Treasury Employees Union*, 513 U.S. 454, 478 (1995).

⁴ The Second Circuit's rejection of the Government's waiver argument is based on the mistaken belief that the visa application and the issuance of the administrative subpoena constituted two separate proceedings because of the time that has elapsed between them and the recent enactment of a statute by Lithuania retroactively criminalizing war crimes committed during World War II. First, as 8 U.S.C. §1225 makes

It is incontrovertible that Fifth Amendment rights, including the right against self-incrimination, may be waived. *Rogers v. United States*, 340 U.S. 367, 373 (1950); *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (Hand, J.), *cert. dismissed*, 319 U.S. 41 (1943).⁵ A waiver may be effected by a voluntary statement of fact made under oath by an individual. Such a statement bars the individual from asserting the Fifth Amendment when subsequently questioned regarding the same subject. The rationale of this rule is clear. If the declarant is permitted to refuse to answer subsequent questions relating to the same subject matter, he or she could

clear, the deposition is not a proceeding, but rather is part of the Government's continuing duty to ensure that visas are only given to those individuals meeting the statutory criteria. Further, the concern underlying the "separate proceedings" rule—a rule that has never been adopted by this Court—is that because of the time that has elapsed between the two proceedings, a new event might cause a new apprehension of prosecution in the witness. The new statute, however, provides no new basis for apprehension. The Soviet Union, of which Lithuania was a part, has prosecuted war criminals since the 1940s in its domestic courts. See *Linnas v. INS*, 790 F.2d 1024, 1030 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986); *Taylor, Nuremberg Trials*, 1949 Int'l Conciliation 241, 255. The Second Circuit also suggested that Balsys could not have waived his Fifth Amendment rights because when he applied for admission to the United States he had no constitutional rights to waive. However by making statements to secure the benefit of permanent resident status and by entering the United States, Balsys has forfeited the right to refrain from answering questions relating to his entitlement to the benefit. If he refuses to answer the questions put by the Government, then he cannot continue to enjoy the benefit. As shown herein, this Court has not looked favorably on a party trying to use the privilege offensively, rather than defensively.

⁵ Indeed, this Court has even held that "an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976); accord *United States v. Balsys*, 119 F.2d 122, 139 (2d Cir. 1997), *cert. granted*, 66 U.S.L.W. 3467 (U.S. Jan. 20, 1998); cf. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222-27 (1973).

manipulate the truth, putting forward his or her sworn version of the facts while denying the Government (or other opposing party) an opportunity to place before the Court or other adjudicative body further clarifying information that can only be obtained from the declarant.

While this issue has never been decided by this Court in this precise procedural posture, it has arisen in the context of witnesses who decline to answer questions, on Fifth Amendment grounds, during cross-examination. As Justice Frankfurter stated in *Brown v. United States*, 356 U.S. 148, 155-56 (1958):

[A witness] cannot reasonably claim that the Fifth Amendment gives him not only this choice [of whether to testify] but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. *It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.* (Emphasis added)

See also *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900); *Brown v. Walker*, 161 U.S. 591, 597-98 (1896); *United States v. Conte*, 99 F.3d 60, 66 (2d Cir. 1996).

Similarly, Circuit Judge Learned Hand stated:

It must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, *it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition.*

St. Pierre, 132 F.2d at 840 (emphasis added).

This rule has been applied not only in cases involving cross-examination, but also in cases implicating analogous interests. In *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991) (Posner, J.), the defendants made voluntary statements in a non-coercive, non-custodial setting to an IRS agent. Those statements (including their refusal to answer certain questions) were admitted into evidence in a criminal proceeding to prove the intent of a crime. Recognizing that this case involved a procedural posture somewhat different from that in the *Brown* line of cases, the Seventh Circuit nonetheless held:

But the underlying principle could be thought the same [as in *Brown*]. The privilege against self-incrimination is not a privilege to attempt to gain an advantage . . . by selective disclosure followed by a clamping up. Having voluntarily given the agent their version of the events, the Davenports forfeited their privilege not to answer questions concerning that version.

Id. at 1174-75.

The same "underlying principle" referenced by Judge Posner is at stake here: Balsys cannot voluntarily testify about his wartime activities under oath in order to gain the government-provided benefit of admittance into this country and then "clam up" about that testimony when the truthful version might result in the loss of the benefit. Indeed, the *Davenport* Court held that where a party is "seeking an advantage by selective disclosure," a waiver of the Fifth Amendment right should be found.⁶ *Id.* at 1175.

⁶ In *Davenport*, the advantage of the disclosure was "to get the Internal Revenue Service to end its investigation." 929 F.2d at 1175. In this case, Balsys, in disclosing that he was "in hiding" during World War II, secured the advantage of ending further government inquiry into his

A number of circuit courts have held that when a party seeks to "mutilate" or "garble" the truth in the manner decried by Justice Frankfurter in *Brown* and by Judge Hand in *St. Pierre* the party must give up the benefit obtained through the voluntary statements made. In *Edmond v. Consumer Protection Div., Office of the Attorney General of the State of Maryland (In re Edmond)*, 934 F.2d 1304 (4th Cir. 1991), for example, Edmond, a debtor in bankruptcy, sought summary judgment, submitting an affidavit in support of his motion. He then refused to be deposed, asserting his right against self-incrimination. The bankruptcy court held that the debtor had waived this right by submitting his affidavit. Because the debtor refused to be deposed, the court struck the affidavit and denied the motion. On appeal, the Fourth Circuit affirmed, applying the reasoning of *Brown*:

The same principle applies when a party seeks to invoke the Fifth Amendment to avoid discovery while offering an affidavit to compel a certain result on summary judgment. An affidavit operates like other testimonial statements to raise the possibility that the witness has waived the Fifth Amendment privilege.

Id. at 1308; see also *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990); *Wehling v. CBS*, 608 F.2d 1084 (5th Cir. 1979) (Court refused to allow plaintiff to continue litigation where he claimed the Fifth Amendment and refused to provide defendant with evidence relevant to its defense, in effect using the privilege as a sword.); cf. *United States v. Linnas*, 527 F. Supp. 426, 429 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir.), cert. denied, 459 U.S. 883 (1982) (where accused Nazi war criminal refused to answer interrogatories

wartime activities, leading to his gaining permanent resident status.

based on Fifth Amendment privilege, all facts pertaining to unanswered interrogatories were deemed admitted).

The rule set out in this line of cases adequately balances the individual's constitutional right against the opposing party's interests. The party asserting the privilege is not required to testify, but cannot take advantage of his or her prior statements.

Under the precedents, Balsys has a choice. He can either submit to questioning regarding his continued eligibility to receive a government benefit (permanent resident status) or give up that benefit. If the rule of *Brown* and its progeny is not applied in cases such as this, parties ineligible for admission to this country would be invited to "mutilate the truth," secure in the knowledge that Government will be severely hampered in its efforts to uncover the truth and to seek their removal through appropriate means from the United States. Balsys, for example, will be able to continue to enjoy the benefits of his sworn version of the facts relating to his wartime activities — permanent residency in the United States — while avoiding questions relating to that version. The ability to retain a benefit by remaining silent after obtaining that benefit through voluntary sworn statements is not the sort of interest the Fifth Amendment was designed to protect.

II. THE INTERESTS OF BOTH THE GOVERNMENT AND BALSYS CAN BE ACCOMMODATED BY PLACING HIS TESTIMONY UNDER SEAL

Although the Government's interest in compelling Balsys's testimony and Balsys's claim to Fifth Amendment rights are at odds, both can be accommodated by the issuance of a comprehensive and restrictive sealing order. Such an order, which is authorized by Rule 26(c)(6) of the Federal Rules of Civil Procedure, would allow the Government to take Balsys's deposition, but could preclude such testimony from being released to a foreign government or anyone else.

While this issue has never been addressed by this Court, several circuits that have considered it have favored the approach advanced by *amici*. Directly on point is *United States v. Juodis*, 800 F.2d 159 (7th Cir.), stay granted *sub nom. Mikutaitus v. United States*, 478 U.S. 1306 (Stevens, Circuit Justice), stay vacated, 479 U.S. 911 (1986). There, Mecislovas Mikutaitus, a naturalized citizen of Lithuanian descent, refused to appear for a deposition in a denaturalization proceeding involving another Lithuanian national who was believed to have committed war crimes in Lithuania during World War II as part of the Nazi-controlled Lithuanian Auxiliary Police. Mikutaitus claimed that the evidence adduced could be used against him in a subsequent criminal trial in the Soviet Union and that an order sealing his deposition would be inadequate to protect his Fifth Amendment right against self-incrimination. On appeal, the Seventh Circuit affirmed the District Court's order requiring Mikutaitus to appear at his deposition, stating:

Mikutaitus has presented no evidence that establishes that the district court lacks the ability to effectively limit access to the deposition or that one of the parties, namely the OSI, is under some form of pressure to ignore the court's order and share the information with the Soviets. While the "parade of horribles" presented by Mikutaitus concerning the possible effect of his testimony may in fact turn out to be true, he has failed to establish any *factual basis* for questioning the efficacy of the accommodation of his rights provided by the district court. A real and substantial fear of foreign prosecution cannot be based on pure supposition concerning the ability of a foreign power to overcome a court order designed to prevent the foreign power from obtaining the information.

Id. at 163. Other circuits have also taken this approach. See, e.g., *In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1199 (11th Cir. 1985); *In re Baird*, 668 F.2d 432, 434 (8th Cir. 1982) (immunized witness can be forced to testify before grand jury despite possibility of foreign prosecution because of grand jury secrecy rules); *In re Weir*, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974) (same).

While some courts have refused to force an immunized witness to testify before a grand jury because of the witness's fear of a foreign prosecution, a situation somewhat analogous to that at bar, such holdings are grounded in the belief that grand juries are not "leakproof." See, e.g., *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 123 (2d Cir. 1982); *United States v. (Under Seal)*, 794 F.2d 920, 925 (4th Cir.), cert. denied sub nom. *Araneta v. United States*, 479 U.S. 924 (1986). Leaks from a deposition—at which attendance may be limited to the witness and officers of the court—are less likely than leaks from a grand jury. *President's Comm'n*, 763 F.2d at 1199. And the District Court can customize the sealing order to further reduce the risk of disclosure.⁷

A comprehensive sealing order that requires all copies of transcripts of the deposition and all material derived therefrom to be deposited with the Court will ensure that Balsys's testimony cannot be used against him. Balsys would not be relying solely on the good faith of law enforcement officials to protect his interests, but that of the court.

⁷ The solution suggested by the Second Circuit—that Congress enact legislation barring deportation to a country in which prosecution is likely—cannot be effectuated in time for the resolution of this case and is unworkable in any event. There would be no way of assuring that the country initially accepting the declarant might not at a later date extradite or deport the declarant to the prosecuting country.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the Second Circuit.

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ELIZABETH HOLTZMAN
Counsel of Record
 Herrick, Feinstein, LLP
 2 Park Avenue
 New York, NY 10016
 (212) 592-1400

SANFORD HAUSLER
Counsel of Record
 1568 59th Street
 Brooklyn, NY 11219-5028
 (718) 633-0847

Counsel for *Amici* World Jewish Congress and Holocaust Survivors and Friends in Pursuit of Justice, Inc.